In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 2

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

MAZINE Z. FOX, ET AL.

No. 3

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

PHILIP LOUIS PARKS, ET AL.

No. 4

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

CHRISTINA MARIEA EDER, EXECUTRIX OF LAST WILL AND TESTAMENT OF JACOB F. OTTMULLER, DECEASED

REPLY MEMORANDUM FOR THE PETITIONER

This memorandum is confined to a comment on *Lawrence* v. *Southard,* 192 Wash. 287, on which

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respondents heavily rely in the brief in opposition to certiorari. That decision, while discussed in the briefs below, was not referred to in the opinion of the court. For a number of reasons it is not relevant here, even on the limited issue of state law, on which alone it could be authoritative.

That case arose as a friendly suit for rescission of a contract for the sale to plaintiff of a parcel of land owned by defendant on the Yakima project, the contract containing a conveyance of a described water right which plaintiff alleged the defendant did not possess. Defendant prayed that the contract be enforced, on the ground that the conveyance was effective. Both parties moved for judgment on the pleadings. The Supreme Court of Washington affirmed a judgment for defendant. In a concurring opinion, Justice Beals pointed out (p. 304) that "The parties chose to submit the cause upon motions for judgment on the pleadings, which admitted all the allegations contained in the complaint and the answer thereto. No evidence was taken, the parties having, in effect, submitted to the court for determination a question of law to be decided upon an agreed statement of facts." After pointing out that the "real question" as to the amount of water which the appellant was entitled to receive could only be heard in some proceeding to which the Federal authorities were parties, the concurring opinion concluded (pp. 304–305) that "no question is here determined save the very

narrow issue of whether or not, upon the facts as pleaded and admitted by the parties to this litigation, the contract as between them is, as between themselves, good and should be carried out. No questions of fact have been determined in this case by judicial finding." Indeed, as will be seen, the essential facts as agreed to by the parties in that case are the contrary of those established and found in the cases at bar.

Appropriation Rights.—The fundamental false assumption in that case was that the United States had not completed its appropriation, by reason of failure to comply with the laws of the State of Washington, and that as the United States had thus failed in this respect, the water users had appropriated the water by applying it to their lands to beneficial use. The court stated, adopting the agreed facts, that while the United States in 1905 filed a withdrawal of the waters of the Yakima River, as provided in Ch. 88, Sess. Laws of 1905 (now appearing as sections 7408–7413 of Remington Revised Statutes, see Petition, App. pp. 29–33), it failed to comply with the procedural requirements of Section 4 of that Act relating to the appropriation of the waters of the Yakima River; and that "the right to the use of the impounded and natural flow waters was acquired for the land which is the subject matter of this controversy by the beneficial use of those waters upon the land for agricultural purposes."

That assumption, upon which the decision in that case turned, is precisely opposite to the facts established in these cases as embodied in the unchallenged findings of fact of the trial court (R. I. 306, 364, 333–334). The trial court found that under date of March 4, 1905, the Secretary of the Interior, acting through his direct subordinate, T. A. Noble, duly withdrew and appropriated, under the provisions of the act of the legislature of the State of Washington, approved March 4, 1905, all of the then unappropriated waters of the Yakima River and its tributaries for the purpose of the irrigation of the lands of all of the various divisions of the Yakima River project, and under date of April 23, 1906, filed a supplemental withdrawal and appropriation of the unappropriated waters; that the United States, acting through the Secretary of the Interior, has complied with the provisions of the laws of the State of Washington applicable to the withdrawal and appropriation of a water supply for the purposes of the Yakima project, and the right of the United States to store, impound, divert, and distribute the waters for the purpose of the water filings ~~and~~ is now in good standing; that under orders dully made by the State Supervisor of Hydraulics, the time allowed for completion of works and beneficial use under the said filings has been extended down to the present time; and that the last extension

(as of the date of the trial herein) extends to December 31, 1942 (R. I. 306, 364, 333–334).

As the Government has pointed out (Petition p. 12), Section 7410 of Remington Revised Statutes expressly provides that waters withdrawn by the United States for reclamation purposes shall not thereafter be subject to appropriation so long as the United States obtains orders from the State extending the time for completion of works, and Section 7411 expressly provides that the United States may appropriate so much of the unappropriated waters as may be required for the project for which water has been withdrawn, such appropriations to be made, maintained and preserved in the same manner and to the same extent as though such appropriation has been made by a private person or corporation, except that the date of priority shall relate back to the date of the first withdrawal of the waters so appropriated. The orders extending the time for completion of work, issued pursuant to the applications of the United States under Section 7410, specifically provide that "during said period the water specified in the aforesaid notices shall not be subject to appropriation under any other law of the State of Washington" (R. III, 1275; R. I, 306–307, 364–365, 334).

In *Lawrence* v. *Southard, supra,* there was significantly missing from the agreed and limited facts, the fact that the withdrawal by the United

States of the waters of the Yakima River had been effected in 1905 and 1906, prior to the time of the water contract with the United States in question (and also prior to the date of the contracts of respondents Fox, Parks, and Eder) and that the withdrawal was in full compliance with the laws of Washington, had been kept in good standing, and was in full force and effect. This significant fact was not only found in the present cases, but was admitted (R. III, 1166–1167, 1276).

Prescriptive Rights.—Respondents also rely upon the *Southard* case as establishing a prescriptive right. Again, the court's discussion of prescriptive rights was premised upon an assumed set of facts and has no application to these cases. Respondents could acquire no rights by prescription in these cases for at least four reasons.

(1) Respondents here could not prevail under settled principles of the law of prescription. Respondents offered no evidence of prescriptive use. Contrary to the assumed facts in the *Southard* case, the record at the trial in these cases showed only a permissive use of the excess water in question; and the record also shows that deliveries of excess water were not continuous for any period of ten years, but were interrupted whenever surplus water was not available for delivery, particularly in low-water years (R. III, 1302, 1438). The decisions in the Supreme

Court of Washington, which the *Southard* case does not disturb, are to the effect that prescriptive rights to irrigation waters cannot be acquired unless the enjoyment relied upon by the claimant was of such character as to afford a ground for action by the other party. *Dontanello* v. *Gust,* 86 Wash. 268, 271; *Smith.* v. *Nechanicky,* 123 Wash. 8, 14. Also, that court has held uniformly that user, to be adverse, must be attended by actual notice or by such circumstances as would impart notice to the person affected of the hostile character of the claim. *Sander* v. *Bull,* 76 Wash. 1, 6; *City of Raymond* v. *Willapa Power Co.,* 102 Wash. 278, 283; *In re Water Rights in Alpowa Creek,* 129 Wash. 9. Furthermore, permissive use of water in the State of Washington gives no title by prescription. *Weidensteiner* v. *Mally,* 55 Wash. 79, 81; *Rhoades* v. *Barnes,* 54 Wash. 145, 148. The decisions of the Supreme Court of Washington are consistent with the general rule on the subject as uniformly applied in the western states. See Kinney, *Irrigation and Water Rights* (2d ed.), p. 1880, Sec. 1050.

(2) Section 3 of the act approved March 4, 1905 (Rem. Rev. Stat. Sec. 7410, see Petition, App., pp. 30–32) which provides for withdrawals of waters for Federal reclamation projects, expressly prohibits any acquisition of withdrawn waters by adverse claim or otherwise. In the *Southard* case

the court assumed erroneously that the United States had failed to comply with this statute.

(3) It is fundamental, of course, that respondents could not acquire a prescriptive right to any amount of water in excess of that needed for beneficial use. In the *Southard* case, it was assumed erroneously that past use was beneficial use. It was assumed, upon unproved facts, that the water in excess of 3 acre feet, to which the court held that defendant had acquired a prescriptive right, was necessary for beneficial use. In these cases, it was affirmatively established that 3 acre feet (in the *Fox* and *Eder* cases) and 3½ acre feet (in the *Parks* case) are all that are needed for beneficial use, and the trial court so found (R. I. 313, 341, 371–372).

(4) Even apart from the foregoing reasons, the decision could not be accepted as adjudging a prescriptive right against the United States. Whatever the rights of the United States, such a prescriptive right would have to include a share of the Government-owned canals and reservoirs, for stored or natural flow waters flowing in the Yakima River would be of no value to respondents unless they also acquired by prescription the Government's title to the Government-owned reservoirs and canals, without which the water could not be conserved or conveyed to the land. Cf. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409. The dissenting opinion in the *Southard*

case, rejecting the inference of a prescriptive right against the United States, is therefore sound in its conclusion on what is at the very least a Federal question, not to be settled by a state court decision. Cf. *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176–177.

Finally, it is evident that the *Southard* decision does not touch the ultimate question in these cases, whether the Secretary of the Interior had authority under the Reclamation Act to issue the notice here attacked, fixing a charge for additional water as between respondents and the United States.

Respectfully submitted.

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U. S. GOVERNMENT PRINTING OFFICE: 1949